Filed 3/27/19 P. v. Tuggle CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MARKYSE TUGGLE et al., Defendants and Appellants.	B282497 (Los Angeles County Super. Ct. No. BA445259)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael Schultz, Judge. Affirmed as modified, and remanded with instructions.

Cindy Brines, under appointment by the Court of Appeal, for Defendant and Appellant Markyse Tuggle.

Sylvia W. Beckham, under appointment by the Court of Appeal, for Defendant and Appellant Dewitt Johnson.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Christopher G. Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

Appellants and defendants Markyse Tuggle (Tuggle) and Dewitt Johnson (Johnson) appeal their judgments after they were convicted of assault with a firearm and attempted kidnapping. Johnson contends that accomplice evidence was insufficiently corroborated, and that his trial counsel provided ineffective assistance by failing to bring a motion for new trial or to object to the prosecutor's vouching for a witness, to her knowing use of the witness's fabricated testimony, and to a coercive plea agreement.

Tuggle joins in these arguments. Johnson also contends that the trial court abused its discretion in denying his motion to discharge retained counsel, and asks that the judgment be corrected to include additional presentence custody credits. Both defendants contend that the imposition of a one-year firearm enhancement was unauthorized, and ask that the matter be remanded to allow the trial court to exercise its newly enacted discretion as to whether to strike five-year recidivist enhancements. Respondent agrees that the one-year enhancement was unauthorized and that Johnson is entitled to additional custody credits.

We modify the judgments accordingly, and as the trial court did not clearly indicate that it would not exercise discretion to strike the recidivist enhancements imposed, we remand to give the court the opportunity to consider it. Finding no merit to defendants' remaining contentions, we affirm the judgments.

BACKGROUND

Johnson, Tuggle and a codefendant were charged with assault with a firearm in violation of Penal Code section 245, subdivision (a)(2),[1] and with kidnapping, in violation of section 207, subdivision (a). The information also alleged that Tuggle

---

[1] All further statutory references are to the Penal Code, unless otherwise indicated.

personally used a firearm in the commission of both crimes, within the meaning of section 12022.5, and 12022.53, subdivision (b). In addition, it was alleged pursuant to section 186.22, subdivision (b)(1)(C), that the crimes were committed for the benefit of, at the direction of, and in association with a criminal street gang, with the specific intent to promote, further and assist in criminal conduct by gang members. Tuggle was also charged as a felon in possession of a firearm in violation of section 29800, subdivision (a)(1).[2] For purposes of sentencing under sections 1170.12 and 667, subdivisions (b)-(j) (the Three Strikes law), and the recidivist enhancement of 667, subdivision (a), it was alleged that Johnson suffered five prior serious or violent felony convictions, and eight prior convictions for which had served prison terms, within the meaning of section 667.5, subdivision (b).

A jury convicted Johnson and Tuggle of assault with a firearm as charged in count 1 and attempted kidnapping as a lesser included offense of count 2. The jury found that a principal was armed during the assault and attempted kidnapping, but found not true the gang enhancements and the personal firearm enhancement alleged against Tuggle.

The trial court found that Johnson had suffered two prior serious felony convictions alleged as five-year recidivist enhancements, five convictions alleged under the Three Strikes law, and four prison prior convictions. The trial court also found that Tuggle had suffered one prior conviction alleged as a five-year recidivist enhancement, one conviction alleged under the Three Strikes law, and two convictions alleged as one-year prison prior enhancements.

---

[2] The jury acquitted Tuggle of possession of a firearm by a felon as charged in count 4.

On May 3, 2017, the trial court sentenced Tuggle to a total of 14 years in prison, comprised of four years on count 1, doubled as a second strike, plus one five-year recidivist enhancement and one year for the firearm enhancement.[3] The court imposed the upper term of four years as to count 2, doubled as a second strike, and stayed the sentence pursuant to section 654. Tuggle received a combined total of 1,361 days of presentence custody credit, and was ordered to pay mandatory fines and fees, as well as direct victim restitution of $3,000.

The trial court sentenced Johnson to a total of 36 years to life in prison, comprised of 25 years to life on count 1, two five-year recidivist enhancements, plus a one-year firearm enhancement. The court struck his four one-year prior prison enhancements. The court imposed the upper term of four years as to count 2, doubled as a second strike, and stayed the sentence pursuant to section 654. Johnson was ordered to pay mandatory fines and fees, $3,000 in direct victim restitution, and received 1,257 days of combined presentence custody credit.

Defendants filed timely notices of appeal.

Prosecution evidence

The victim's testimony

At the end of May 2015, Shalonda McNeal broke off her eight-year relationship with Craig Gordon, a man she knew to be

---

[3] The original minutes of the sentencing and the abstract of judgment both erroneously list five one-year enhancements imposed pursuant to section 667.5, subdivision (b), rather than the court's oral pronouncement of one five-year enhancement under section 667, subdivision (a)(1), plus a one-year firearm enhancement pursuant to section 12022, subdivision (a)(1). The court struck Tuggle's prison priors for purposes of enhancement. Tuggle reports that the superior court granted his request to correct the minutes and abstract on December 5, 2017.

a member of the Santana Block Crip criminal street gang (SBCC) and whose nickname was "Bone." He tried to fight her in the front yard while her family watched from her apartment, and "[h]e tore it up outside."

McNeal knew Johnson by his nickname, "Whiskey," and as a "homeboy" of Gordon's. McNeal had seen Johnson in her neighborhood five or six times, including in the area where SBCC members previously congregated.

McNeal testified that at 3:00 a.m. on June 23, 2015, she left her Compton apartment where she lived with her 13-year-old son, intending go to work. As she walked out the front gate she was assaulted by two men and a woman. McNeal later identified Tuggle as one of the two men.

Tuggle and the other man each carried a black gun in his hand. Tuggle hit McNeal with his gun on the left side of her face and then tried to pick her up and get her into her car which was parked about 30 feet away. As McNeal fought him and screamed, Tuggle continually hit her and pulled her hair while moving her closer and closer to her car. One of the assailants told her to give up because they already had her son. Tuggle kicked McNeal while she was on the ground and finally got her into the car. When they could not find the car keys, the woman left to get her car while Tuggle restrained the still struggling McNeal by placing himself on top of her. As McNeal continued to fight the unidentified man said, "Just shoot this bitch. Shoot the bitch." McNeal then heard a gunshot and saw that Tuggle had been shot while he was still on top of her, facing her. After some moments, the injured Tuggle got out of the car. McNeal then escaped and the other man fired in her direction. By then McNeal's neighbors had come outside, and one of them knocked Tuggle to the ground as the other man walked away. McNeal called 911 as she watched Tuggle on the sidewalk, screaming in pain. She never

saw the woman again. The police came and detained Tuggle, who was taken to the hospital, where McNeal later identified him as her assailant.

Accomplice testimony

Former codefendant Thomonte Rander (Rander) pled guilty to all charges and allegations prior to trial in exchange for a prison sentence of 14 years, so long as he testified truthfully in the trial of his codefendants. Rander identified Tuggle as his cousin, and Johnson as a friend of Rander's father, who Rander had known for almost three years. Johnson and Rander's father were both members of SBCC. Rander associated with Johnson about two or three times per week in 2014 and 2015, and they often spoke on the phone. Rander knew Johnson as a "big homie," an "OG," meaning an original gangster who "calls shots." Rander explained that this meant that Johnson was an older gang member whose role was to tell younger members what to do. Rander had known his cousin Tuggle all his life, and they "hung out" often, at least weekly, in late 2014 into 2015.

Rander admitted participating in the aborted kidnapping and assault of McNeal with Tuggle and Johnson. He testified that Johnson approached him in June 2015 with the plan to kidnap one of his friend's ex-girlfriends who was a drug dealer with money, and that Rander might make some money by participating. The friend, "Bone," had fought the girlfriend and then her brother beat him up. They planned to grab her (McNeal) when she came out of her home, force her into her car, and take her to the San Bernardino home of Johnson's friend Chubs, a member of the Neighborhood Compton Crip gang. At that time Tuggle was living in San Bernardino and Johnson lived in Banning. Because the victim left for work at 2:00 or 3:00 a.m., they planned to be there at midnight or 1:00 a.m. Johnson said they would get $50,000, and if they did not get money from her,

they were to call Bone or Marcel Kemp. Tuggle was acquainted with Kemp through Johnson. Kemp's moniker was "Celly" and he was a member of SBCC.

Johnson wanted to bring in more people. Rander called Tuggle to participate because they were close and Rander could rely on him. The day before the assault they did a dry run. Rander and Tuggle went in one car, with Johnson in a separate car. They met at Kemp's house in Compton. Johnson showed Rander where McNeal lived, pointed out McNeal's car, and they discussed the plan.

The next afternoon and evening, Rander spoke to Tuggle and Johnson by phone to go over their plan to kidnap McNeal, not knowing that law enforcement was recording Rander's telephone conversations pursuant to an unrelated investigation. Rander identified his and Johnson's voices in two conversations which were played in court.[4] During one conversation Johnson said, "You have to have confidence," which meant to Rander that they were going to go through with the plan. They agreed to leave at "twelve-thirty" to be there at two or three o'clock. That night, Rander, Tuggle, and Tiffany met, and Tiffany drove Tuggle's car to the Lynwood-Compton area, where they met up with Johnson in front of Kemp's house, near a Jack-in-the-Box restaurant. Johnson was in another car with his stepson and a man Rander did not know. It was agreed that Tiffany would drive, while Tuggle and one of the other men would do the actual grabbing. Tuggle had a nine-millimeter handgun, and Johnson had a gun, or said that he did. One of Johnson's associates also

---

[4] A San Bernardino Sheriff's Department sergeant who was part of the task force investigating Tuggle testified that a wiretap was placed on Tuggle's phone, and later on phones associated with Rander and Johnson. He became familiar with their voices and identified them in the recorded calls.

had a gun. The group arrived in McNeal's neighborhood at approximately 1:00 a.m. and waited for McNeal to come outside. Tuggle and Tiffany were in Rander's car, while Johnson, his stepson and the other man were in another car. Rander heard a scream and saw Tuggle and the other man tussling with the victim. Tiffany got out of Rander's car, and Rander drove it around the block, circled back, and heard gunshots and more screaming when he came back around. Rander drove back home after he could not find Tuggle or Tiffany. He did not look for Johnson, but called him after he got back to his home.

Cell phone evidence

An expert in wireless communications, Jim Cook, analyzed company records relating to cell phones associated with defendants and Rander. Through a PowerPoint presentation he demonstrated where the phones were located between 12:30 a.m. and 6:00 a.m. on June 23, 2015.[5] Cook determined that at approximately 12:30 a.m., Johnson's and Rander's phones were traveling from an area just west of San Bernardino toward Los Angeles. By 1:30 a.m., Rander's and Johnson's phones were communicating with each other in Compton, in the vicinity of a Jack-in-the-Box restaurant not far from the crime scene. By 2:00 a.m., Johnson's phone was within a few yards of the crime scene, verified by GPS pings at 2:03 a.m. and 2:18 a.m. Rander's phone

---

[5] Cook identified the numbers as targets No. 1, 2-1, 2-2, and 3. As identified by investigators, those target numbers correspond to the following phone numbers and users of the phones: target No. 1, ending in 8566, used by Johnson; target No. 2-1, ending in 4686, and target No. 2-2, ending in 7132, both used by Rander; and target No. 3, ending in 0785, used by Tuggle. For convenience we refer to each target number by the user's name, and although Rander used two phones, we refer simply to Rander's phone.

was also within a few yards of the crime scene, verified by GPS pings at 2:33 a.m., 2:48 a.m., and 3:03 a.m. At 3:11 a.m., the phones of both Rander and Johnson moved northward, stayed in one location for approximately 40 minutes, and then traveled east toward San Bernardino and Banning. Between 5:00 a.m. and 6:00 a.m., Rander's phone communicated with Johnson's phone. Rander's phone reached the area of Rander's home at 5:06 a.m. Johnson's phone reached the area of Johnson's home at 6:12 a.m.

Gang evidence

A San Bernardino Sheriff's deputy testified that on May 3, 2015, Johnson said he had joined SBCC at a young age and was still in good standing in the gang. After Johnson was arrested, he admitted to investigators that he was "from Santana" and had been since he was a kid.

The prosecution's gang expert, Los Angeles County Sheriff's Detective Joseph Sumner, testified that respect, reputation, and money are very important to gang members who commonly use violence to control their neighborhoods. Gang members will also violently retaliate if a fellow gang member is assaulted. The gang would lose respect if there was no retaliation or other repercussions for an assault. Recently it has become common for members of different gangs, even for rival members, to work together when a large amount of money is involved.

Given hypothetical questions with facts mirroring those in evidence, Detective Sumner gave his opinion that the hypothetical crime began as a dispute between girlfriend and boyfriend, it evolved into a gang-related offense when the boyfriend, a gang member, enlisted a fellow member of the gang to commit a crime against the ex-girlfriend, and the fellow gang member then associated other gang members. He opined that the crime would benefit the gang's reputation and bolster respect of participants who were members of that gang. He also testified

that the crime was directed by the gang because it was directed by a senior member of the gang.

Defense evidence

The defense called law enforcement witnesses to testify regarding Rander's false or inconsistent statements made early in the investigation, and to show that although Rander had some gang tattoos he did not have any tattoos associated with SBCC.

The defense presented the testimony of a gang expert who testified that Compton gangs would not work with other gangs to commit a crime. A gang member would retaliate if beaten up, and would call on his friends from the neighborhood to help him, but would not call someone outside his neighborhood for help. Retaliation with the help of fellow gang members is less common than it once was, but if a hard-core gang member is beaten up, he will retaliate, but not against his ex-girlfriend whose brother has beaten him up.

DISCUSSION

I. Corroboration of accomplice testimony

Johnson contends that there was insufficient independent corroborating evidence connecting him to the crimes. He asserts that there was evidence of no more than his association with Rander and an opportunity to commit the crimes.

Section 1111 provides, in relevant part: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." "[F]or the jury to rely on an accomplice's testimony about the circumstances of an offense, it must find evidence that, "without aid from the accomplice's testimony, tend[s] to connect the defendant with the crime."' [Citations.]" (*People v. Romero and Self* (2015) 62

Cal.4th 1, 32-33 (*Romero and Self*).) "The trier of fact's determination on the issue of corroboration is binding on the reviewing court unless the corroborating evidence should not have been admitted or does not reasonably tend to connect the defendant with the commission of the crime. [Citation.]" (*People v. McDermott* (2002) 28 Cal.4th 946, 986 (*McDermott*).)

At the outset we reject the implied premise underlying Johnson's arguments that the corroborating evidence must have been sufficient to *prove* his connection to the crime. Contrary to such a suggestion, the evidence needs only to "'*tend*, *in some degree*, to connect the defendant with the commission of the offense.'" (*Romero and Self, supra*, 62 Cal.4th at p. 36, italics added.) It is not the purpose of corroborative testimony to establish guilt. (*Ibid.*) The purpose of corroboration is to establish the reliability of accomplice testimony. (*People v. Tewksbury* (1976) 15 Cal.3d 953, 968-969.) Thus, corroborating evidence "is sufficient if it substantiates enough of the accomplice's testimony to establish his *credibility*." (*McDermott*, *supra*, 28 Cal.4th at pp. 1000-1001, italics added.)

We also reject Johnson's assertion that the evidence was insufficient *as a matter of law* because there was no independent *physical* evidence connecting him to the crime, such as fingerprints. Johnson cites no authority for this assertion, but merely cites as an example, a case where there was physical evidence. (See, e.g., *People v. Narvaez* (2002) 104 Cal.App.4th 1295, 1305.)

Johnson acknowledges the evidence of his association with Rander, his presence near the crime scene at the time of the assault on McNeal, and his telephone statements to Rander about a plan to meet at the time of the crime. However, he enumerates and discusses these and other categories of evidence separately in order to show that *each* such category does not

connect him to the crime. The separate categories which Johnson enumerates are, in essence: physical evidence; motive; the existence of Tiffany; Rander's prior inconsistent statements; "mere" association with the perpetrator; cell tower and GPS evidence; and statements in the recorded telephone conversations. Johnson's approach fails to take into account that it is "'[t]he entire conduct of the parties, their relationship, acts, and conduct [that] may be taken into consideration by the trier of fact in determining the sufficiency of the corroboration.' [Citations.] 'The prosecution is not required to single out an isolated fact which in itself, unrelated to other proven facts, is considered to be sufficient corroboration.'. . . The evidence 'need not . . .' corroborate every fact to which the accomplice testifies [citation], and "'may be circumstantial or slight and entitled to little consideration when standing alone"' [citation]." (*Romero and Self, supra*, 62 Cal.4th at p. 32.) For example, in *McDermott*, sufficient corroboration came from independent evidence, considered together, of the defendant's relationship with the accomplice, his presence at the crime scene with superficial wounds compared to the victim's 44 stab wounds, and motive. (*McDermott*, *supra*, 28 Cal.4th at pp. 985-986.)

Rander's testimony regarding Johnson's plans to commit the crime was corroborated by the recorded conversations. Although the statements were vague, as Johnson repeatedly points out, it is clear that Rander and Johnson agreed to leave at twelve-thirty in order to meet at two or three o'clock and be there "when they . . . leave." In one conversation, Johnson asked, "We leave about twelve, one, twelve thirty-one. Alright?" He added, "If they say three, shit. It'll probably be uh like two-thirty, when they you know, leave." Rander then agreed with Johnson that they would "leave at twelve-thirty then." Ample evidence showed that Rander and Johnson did indeed leave home around 12:30

a.m. Cell tower and GPS records showed that their phones left the San Bernardino/Banning area and traveled toward Los Angeles at that time, arriving near the crime scene at approximately 1:30 a.m. The records also establish there was communication between their phones around that time. Johnson's phone was within a few yards of the crime scene at least until 2:18 a.m., and at 3:11 a.m. Johnson's phone left Compton, traveled back to Banning, where it arrived at 6:12 a.m., and communicated with Rander's phone in the meantime.

Johnson contends there was insufficient corroboration because there was no independent evidence of motive. To support this claim, he argues the only evidence of motive came from Rander's testimony that McNeal's brother had beaten up Gordon. This argument ignores another motive suggested by other evidence. McNeal testified that three weeks before the assault, she had broken off an eight-year relationship with Gordon, and she described conduct (he tried "to fight" her and he "tore it up") indicating that he was very angry and there was a physical altercation. A gang expert testified that respect is very important to gang members, who commonly use violence when retaliating for an assault on themselves or other members. But a jilted lover need not be a gang member to retaliate violently. Gordon's apparent anger over McNeal's ending an eight-year relationship over a fight in view of her family members could very well have provided Gordon with a motive of revenge, and Johnson's close association with Gordon could have been a motive to assist. Johnson and Gordon were both members of SBCC. Johnson or "Whiskey," was Gordon's "homie."

The corroborating evidence consisted of the close relationships between Gordon and Johnson and between Rander and Johnson; telephone conversations suggesting Johnson's planning; cell data showing Johnson's movements at the planned

times to the crime scene and back; and circumstantial evidence of a retaliatory motive. Considering all the evidence together, we conclude that it tended to connect Johnson to the crime, and was thus sufficient to establish reliability of Rander's testimony.

II. Ineffective assistance of counsel

Both defendants contend that Rander's testimony was fabricated, that the prosecutor knowingly used Rander's "blatantly false testimony," and that she vouched for his credibility. Johnson argues that although Rander's plea agreement simply called for him to testify truthfully, it provided an incentive to testify in a manner which would please the prosecutor, and he claims that Rander *subjectively* understood that he was required to testify consistently with his pretrial statement of February 17, 2017. Johnson concludes that all of these alleged errors or misconduct deprived him of due process and a fair trial. Tuggle joins in Johnson's arguments.

Defendants concede that defense counsel did not object to Rander's testimony, the plea agreement, or any alleged prosecutorial misconduct and thus review of these claims may be deemed to have been forfeited. (See *People v. Turner* (2004) 34 Cal.4th 406, 432 [vouching]; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1253 [knowing use of false testimony and due process]; *People v. Marshall* (1996) 13 Cal.4th 799, 829-830 [prosecutor's improper remarks].) Defendants' failure to object to Rander's testimony due to an improper plea agreement forfeits that issue as well. (See *People v. Boyer* (2006) 38 Cal.4th 412, 454, 457 [claim of coercive immunity agreement].) Defendants contend that the judgment should nevertheless be reversed, arguing that defense counsel's failure to object below resulted in a violation of their constitutional right to the effective assistance of counsel.

The Sixth Amendment right to assistance of counsel includes the right to the effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 686-674 (*Strickland*); see also Cal. Const., art. I, § 15.) It is the defendants' burden to demonstrate that their counsel's representation fell below an objective standard of reasonableness, as well as a reasonable probability that, but for counsel's deficient performance, the result of the trial would have been different. (*Strickland*, at pp. 686-687, 694.)

We presume that counsel's tactical decisions were reasonable, unless "'"the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission."' [Citation.]" (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437.) "If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. [Citation.]" (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.)

Tuggle contends that there could be no conceivable satisfactory explanation for defense counsel's failure to move to strike Rander's allegedly fabricated testimony or to exclude Rander's testimony on grounds that it was induced by a coercive plea agreement, as well as counsel's failure to object to improper vouching of Rander's testimony by way of the plea agreement itself and during the prosecutor's closing argument, and to move for a new trial based upon the jury's rejection of the gang charges.[6]

---

[6] Johnson asserts the same alleged trial court and counsel errors, but they are discussed in a disjointed fashion throughout his briefs, with cross-references and arguments incorporated into

A. "Fabricated" testimony

Contrary to defendants' conclusion that there could be no satisfactory reason not to object, we observe that "[c]ounsel does not render ineffective assistance by failing to make motions or objections that counsel reasonably determines would be futile." (*People v. Price* (1991) 1 Cal.4th 324, 387.) Defendants have not demonstrated that Rander's testimony was "blatantly false" or that a motion to exclude the testimony would have had merit. Even where a witness is shown to have a motive to lie, a trial court has no authority in a jury trial to exclude the testimony whenever the court believes, based upon its own assessment, that the witness is not credible. (See *People v. Hovarter* (2008) 44 Cal.4th 983, 996.) Unless the evidence given is impossible or inherently improbable "'doubts about the credibility of [an] in-court witness should be left for the jury's resolution . . . .' [Citation.]" (*Ibid.*) A finding of "'inherently improbable' . . . is so rare as to be almost nonexistent." (*People v. Ennis* (2010) 190 Cal.App.4th 721, 728.) "The inherently improbable standard addresses the basic content of the testimony itself -- i.e., could that have happened? -- rather than the apparent credibility of the person testifying. Hence, the requirement [is] that the improbability must be 'inherent,' and the falsity apparent 'without resorting to inferences or deductions.' [Citation.]" (*Id.* at p. 729.) Here, defendants make no contention or argument relating to impossibility or inherent improbability, nor do they mention the concepts. Johnson has instead catalogued the

---

others, some under a single heading and some under different headings. In an effort to make the arguments easier to follow, we change the order of presentation of the issues. As all the alleged trial court errors have been forfeited, we discuss them all as a claim of ineffective assistance of counsel, separated by each particular alleged counsel or court error.

inconsistencies and contradictions in Rander's testimony and pretrial statements, and argues he had a motive to lie.

The jury was thoroughly instructed with regard to assessing witnesses' credibility, including the resolution of conflicts and inconsistencies, giving consideration to motive to lie and prior falsehoods. The jury was authorized to reject parts of Rander's testimony it believed to be false and to accept those parts it believed to be the truth. (See *People v. Maxwell* (1979) 94 Cal.App.3d 562, 575-577.) The jury was expressly so instructed, and as we have found, Rander's trial testimony was sufficiently corroborated for the jury to find his version of events to be credible. Defendants thus have not demonstrated that the trial court or reasonable counsel would have found merit in a motion to exclude Rander's testimony on the ground that it lacked credibility, and we reject the claim of ineffective assistance of counsel on this ground.

B. "Coercive" leniency agreement

Defendants contend that defense counsel should have objected or moved to exclude Rander's testimony because it was induced by a coercive leniency agreement.

An offer of immunity or leniency is proper if based upon the condition that the witness testify truthfully to the facts involved. (See *People v. Boyer*, *supra*, 38 Cal.4th at p. 455 [immunity].) However, if the "agreement places the witness under a strong compulsion to testify in a particular fashion, the testimony is tainted by the witness's self-interest, and thus inadmissible. [Citation.] Such a 'strong compulsion' may be created by a condition '"that the witness not materially or substantially change her testimony from her tape-recorded statement already given to . . . law enforcement officers."' [Citation.]' [¶] On the other hand, testimony [is admissible when] subject to grants of immunity which simply suggested the prosecution *believed* the

prior statement to *be* the truth, and where the witness understood that his or her sole obligation was to testify fully and fairly." (*Ibid*.)

In relevant part, Rander's agreement provided as follows:

> "1. [Rander] agrees to testify truthfully and completely at all proceedings, whenever they may occur, involving the prosecution of defendants . . . for the assault with a firearm, kidnapping and false imprisonment of Shalonda McNeal.
>
> "[¶] . . . [¶]
>
> "5. The issue of whether or not [Rander] has in fact testified truthfully and completely will be decided by a neutral magistrate.
>
> "[¶] . . . [¶]
>
> "8. Should [Rander] violate any terms of this agreement, the People (and only the People) shall have the right to declare this agreement null and void. . . .
>
> "9. Overriding all else, it is understood that this agreement requires [Rander] to tell the truth at all times during these proceedings. This means that [Rander] must not falsely accuse someone who is innocent and must not falsely exonerate someone who is guilty. [Rander's] obligation is not to say what he believes will make the People or the defense attorney(s) happy, but instead, his obligation is to tell the truth, no matter what the consequences. . . ."

Rander's signature appears at the end, over the following paragraph:

> "I have read this letter in the presence of my attorney. I understand everything that is set forth in

> this letter. I accept the agreement and the conditions as stated in the letter. I do this freely and voluntarily and of my own free will. No threats have been made, and no promises other than those outlined in the letter have been made to me or my family by anyone."

Johnson concedes that Rander's plea agreement "on its face, did not require Rander to provide any particular version of events," but instead required him to testify truthfully "no matter what the consequences." Johnson contends however, that the agreement was coercive in violation of due process for the following two reasons, which he articulates as follows: "(1) according to the express terms of the agreement, the prosecutor had the final say whether *or not* to revoke the leniency agreement, even if Rander embellished or even outright fabricated his testimony and (2) Rander's subjective understanding of the agreement was that he was required to conform his testimony to the statement provided to the prosecutor -- a statement which was renovated and offered to induce the prosecutor to offer a leniency agreement."

As respondent points out, "unless the bargain is *expressly contingent* on the witness sticking to a particular version" the testimony is admissible. (*People v. Garrison* (1989) 47 Cal.3d 746, 771, italics added.) Johnson argues that the term giving the prosecutor the sole power to void the agreement (paragraph 8) made the agreement "explicitly" coercive because it provided a strong incentive to testify in a manner that would please the prosecutor. Johnson has confused the adverbs. "Explicitly" means "*expressly* and not merely by implication." (See Oxford English Dictionary Online, <http://www.oed.com/view/Entry/66636?redirectedFrom=explicitly#eid>, italics added.) As Rander's agreement does not *expressly* state that he was

encouraged or incentivized to testify in a manner, we reject this first argument that the agreement was coercive.

Johnson's second reason, Rander's subjective belief that he was required under the agreement to testify to a particular version of the facts, is wholly unsupported by the record. Rander testified that he understood that he would not receive the benefit of the plea agreement unless he testified truthfully. He also testified that his statement to the prosecutor was the truth. In an effort to show otherwise, Johnson liberally paraphrases Rander's testimony as follows: "Rander testified that he made the new statement on February 17, 2017 (which aligned with the prosecutor's other evidence i.e., an attempt to 'kidnap' and 'Tiffany' as the female accomplice) with the hope of obtaining a favorable plea deal." The actual testimony on the cited page of the reporter's transcript cited by Johnson does not demonstrate a subjective belief on Rander's part that he was required under the agreement to testify to a particular version of the facts. In relevant part, defense counsel and Rander engaged in the following colloquy:

> "Q: So you made the statement with the hopes of getting a better deal, right?
>
> "A: Probably, yes.
>
> "Q: And you knew that in the statement, you had to incriminate your co-defendant, right?. . .
>
> "A: I had to tell the truth about all of us, all of our parts.
>
> "Q: You believe that you would have gotten a better deal if you told the story that didn't inculpate your co-defendants?

> "A: I wouldn't have got no deal because it would have been a lie. If I would have said, well, he grabbed her and I grabbed her, that would have been a lie right there."

Thus, contrary to Johnson's characterization of the testimony, Rander clearly demonstrated that he understood that he was required to testify truthfully. Defendant has not shown that Rander's testimony would be excluded or stricken on the ground that the plea agreement was coercive. Defense counsel did not render ineffective assistance by refraining from making such unmeritorious motions.

C. Alleged vouching

Johnson contends that evidence of the plea agreement and remarks in the prosecutor's closing argument, amounted to improper vouching for Rander's credibility.

"'Prosecutorial assurances, *based on the record*, regarding the apparent honesty or reliability of prosecution witnesses, cannot be characterized as improper "vouching". . . .' [Citation.] No impermissible 'vouching' occurs where 'the prosecutor properly relie[s] on facts of record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief.' [Citations.]" (*People v. Williams* (1997) 16 Cal.4th 153, 257.) "A prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record. [Citations.] Nor is a prosecutor permitted to place the prestige of her office behind a witness by offering the impression that she has taken steps to assure a witness's truthfulness at trial. [Citation.]" (*People v. Frye* (1998) 18 Cal.4th 894, 971, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) However, a prosecutor must "disclose to the jury any inducements made to a prosecution witness to testify [citation]."

(*Id*. at p. 970.) Thus, a prosecutor may recount the nature of a plea agreement in which a witness is required to testify truthfully and honestly, as an aid to the jury's evaluation of the witness's credibility. (*Ibid*.; *People v. Williams*, *supra*, at p. 257; see *People v. Seumanu* (2015) 61 Cal.4th 1293, 1330-1331.)[7]

Johnson also asserts that the prosecutor gave the impression of vouching when she argued, "Rander is facing 40 years to life -- it's not me, it's not defense counsel, it's not you, but the judge decides whether or not he's lying on the stand. If the judge determines that he lied to you, he's facing 40 years to life." Johnson argues that an agreement under which the judge is the arbiter of whether Rander gave truthful testimony indicated to the jury that the government had taken steps to compel him to be truthful. As such a provision is not relevant to credibility and is potentially misleading to the jury, the trial court should exclude mention of it on timely and specific objection. (*People v. Fauber* (1992) 2 Cal.4th 792, 823-824.) Defense counsel did not object to the ambiguous argument or request a clarifying instruction. However, such an argument is harmless where it does not appear that the jury was misled and the jury has been given an instruction such as CALJIC No. 2.20, which tells the jury "that '[e]very person who testifies under oath is a witness. . . . You are the sole judges of the believability of a witness and the weight to

---

[7] Johnson asks that we rely on federal cases to rule otherwise, including *United States v. Brown* (9th Cir. 1983) 720 F.2d 1059, 1072 [plea agreement containing promise to take a polygraph examination], and *United States v. Roberts* (9th Cir. 1980) 618 F.2d 530, 535-536 [plea agreement with promise to testify truthfully].) We decline to do so, as we are not bound by the decisions of the federal circuit courts (*People v. Brooks* (2017) 3 Cal.5th 1, 90), while on the other hand, we are bound by the decisions of the California Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

be given to his testimony . . . .' [Citation.]" (*Ibid*., fn. omitted.) Here, the jury was instructed with its equivalent, CALCRIM No. 105, that "[y]ou alone must judge the credibility or believability of the witnesses." As we find no evidence in the record to indicate that the jury did not understand and follow this instruction, we presume that it did. (*Fauber*, at p. 823.) Furthermore, it is unlikely that a jury would be misled where, as here, "[t]he context of the remarks made it clear that [the judge's] determination would occur if the prosecutor sought to repudiate its agreement with [the witness] after trial in defendants case." (*Ibid*.)

As defendants have not demonstrated that the prosecutor's remarks were prejudicial, we reject their claim of ineffective assistance based on any failure to object to the remarks. (See *Strickland*, *supra*, 466 U.S. at p. 686.)

D. New trial motion

Defendants contend that after the jury found the gang allegation not true, defense counsel rendered ineffective assistance by failing to move for a new trial on the substantive offenses on the grounds that their pretrial oral motion to bifurcate the gang enhancement allegation should have been granted, and that the gang evidence presented at trial rendered the trial fundamentally unfair in violation of their right to due process.

First, defendants have not shown that their motion to bifurcate should have been granted. "In a case not involving imposition of the gang enhancement, . . . 'evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal.' [Citation.] On the other hand, 'evidence of gang membership is often relevant to, and admissible regarding, the charged offense.' [Citation.] Given the public policy preference for the efficiency of a unitary trial, a court's

discretion to deny bifurcation of a gang allegation is broader than its discretion to admit gang evidence in a case with no gang allegation. [Citation.] Thus, '[e]ven if some of the evidence offered to prove the gang enhancement would be inadmissible at a trial of the substantive crime itself . . . a court may still deny bifurcation.' [Citation.]" (*People v. Franklin* (2016) 248 Cal.App.4th 938, 952 (*Franklin*), quoting *People v. Hernandez* (2004) 33 Cal.4th 1040, 1049-1050.)

"We review the trial court's denial of the motion to bifurcate for abuse of discretion, based on the record as it stood at the time of the ruling. [Citations.] Our review is guided by the familiar principle[s] that '[a] court abuses its discretion when its rulings fall "outside the bounds of reason"' [citations] [and that] an abuse of discretion is 'established by "a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice."' [Citation.]" (*Franklin*, *supra*, 248 Cal.App.4th at p. 952.)

The question whether a motion to bifurcate should have been granted is determined from the record before the court at the time of the ruling. (*People v. Mendoza* (2000) 24 Cal.4th 130, 160-161.) After defense counsel made the oral motion to bifurcate, the prosecutor objected, noting that not only was the gang evidence relevant to the allegation under section 186.22, but it was also relevant to the issues of motive and identity, which required connecting the defendants to one another, partly through gang membership of defendants, a witness, and relatives, as well as gang culture. The prosecutor explained that the victim was the ex-girlfriend of a SBCC gang member, their break-up provided his motive for the assault, he recruited Johnson, who sought help from Tuggle, who in turn, recruited his cousin (Rander). In addition, the prosecutor argued that, the

victim was fearful of testifying due to defendants' gang connections, which could impact her testimony.

The trial court deferred ruling in order to read the preliminary hearing transcript. Then defense counsel submitted the motion without argument. The court summarized the testimony given at the preliminary hearing, found that the evidence supported the prosecutor's proffer, concluded that defendants had not met their burden, and denied the motion. Defendants made no effort to support their motion below, and make no effort here to demonstrate that the record before the trial court at the time of the motion, including the transcript of the preliminary hearing, failed to support the court's ruling.

Indeed, defendants do not refer to the evidence presented at the preliminary hearing, but instead summarize trial evidence. If, as it appears, defendants are relying solely on the fact that the jury found the gang enhancement to have been unsupported by the evidence, their reliance is misplaced, and they have failed to demonstrate that denying the motion was an abuse of discretion. (See *Franklin*, *supra*, 248 Cal.App.4th at p. 953.) Defendants have failed to demonstrate that counsel was ineffective due to his failure to move for a new trial on the ground that the motion to bifurcate should have been granted.

Second, even if we were to assume that the trial court erred, defendants have failed to demonstrate that the gang evidence presented at trial rendered the trial fundamentally unfair in violation of their right to due process. "To prove a deprivation of federal due process rights, [the defendant] must satisfy a high constitutional standard to show that the erroneous admission of evidence resulted in an unfair trial. '*Only if there are no permissible inferences the jury may draw from the evidence can its admission violate due process*. Even then, the evidence must "be of such quality as necessarily prevents a fair trial."

[Citation.] Only under such circumstances can it be inferred that the jury must have used the evidence for an improper purpose.' [Citation.] 'The dispositive issue is . . . whether the trial court committed an error which rendered the trial "so 'arbitrary and fundamentally unfair' that it violated federal due process." [Citation.]' [Citation.]" (*People v. Albarran* (2007) 149 Cal.App.4th 214, 229-230, fn. omitted, italics added.)

Defendants contend that the gang evidence was not probative of motive or identity and bore no "*legitimate* relevance" to the issues of aiding and abetting or an uncharged conspiracy. (Italics added.)[8] Defendants' burden, however, is to demonstrate circumstances under which it "'can it be inferred that the jury must have used the evidence for an improper purpose.' [Citation.]" (*Albarran*, *supra*, 149 Cal.App.4th at p. 229.) Such an inference may arise where *no* gang enhancement was alleged, and the prosecution "presented a large volume of extremely inflammatory and incriminating gang evidence that had no connection to the charged crimes." (*People v. Pettie* (2017) 16 Cal.App.5th 23, 46.) However, that was not the case here. The gang enhancement was alleged in the information, and the gang evidence was not abundant, it was not unusually inflammatory, it was connected to the charged crimes, and it was relevant to the credibility of the two primary witnesses. "'[E]vidence that a

---

[8] Johnson suggests that the conspirators' motives were not gang related because the jury found the gang allegation not true. To find a gang enhancement allegation true, the jury must find that the crimes were committed for the benefit of, at the direction of or in association with a criminal street gang, with the specific intent to promote, further and assist in criminal conduct by gang members. (§ 186.22, subd. (b)(1)(C).) As it is unknown which one or more of these elements the jury rejected and what part motive had in the finding, the not-true finding is not helpful to the discussion.

witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness . . . [as is an] explanation of the basis for the witness's fear . . . .' [Citations.]" (*People v. Merriman* (2014) 60 Cal.4th 1, 86.) In particular, giving testimony despite the risk of retribution by gang members properly tends to bolster a witness's credibility. (See *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368.)

Rander testified against Johnson, his father's fellow gang member, despite the knowledge that he could be attacked in prison or murdered as a snitch for doing so. McNeal was afraid to testify, knowing that Gordon and Johnson were both members of SBCC and friends. The gang evidence explained Johnson's connection to Gordon and his motive for committing the crime, which in turn tended to identify him as one of the conspirators. Contrary to Johnson's claim that *only* the cell data, wiretaps, and accomplice testimony were relevant to his identity and motive, evidence of gang culture was relevant to explain that evidence and show that Johnson conspired to commit the crime and enlisted the help of other gang members. McNeal's rejection of Gordon and the subsequent beating of Gordon by her brother would have brought disrespect to the gang and to Gordon if he had not retaliated. Also, the SBCC often used violence when retaliating. The crime was committed near SBCC territory, and Johnson would be expected to help maintain the gang's violent reputation there. This evidence was "probative to explain why a witness might be reluctant or afraid to testify against them." (*People v. Pettie, supra*, 16 Cal.App.5th at p. 44.)

As the gang evidence was cross-admissible, any inference of prejudice was dispelled. (See *People v. Hernandez*, *supra*, 33 Cal.4th at pp. 1049-1050.) Furthermore, defendants have not shown circumstances from which it can it be inferred that the jury used the evidence for an improper purpose. The trial court

instructed the jury with CALCRIM No. 1403, that in addition to considering the evidence in deciding whether the defendants acted with the intent, purpose, and knowledge required to prove the gang enhancement, "You may also consider this evidence when you evaluate the credibility or believability of a witness and when you consider the facts and information relied on by an expert witness in reaching his or her opinion. You may not consider this evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime." We presume the jury understood and faithfully followed the limiting instruction. (*People v. Gonzales* (2011) 51 Cal.4th 894, 940.) Moreover, the jury's not-true finding on the gang allegation, as well as its acquittal of one count against Tuggle and rejection of a firearm enhancement demonstrates that the jury carefully considered its instructions and evaluated the evidence. We conclude that defendants have not demonstrated fundamental unfairness as a result of the admission of the gang evidence. It follows that defendants have not shown that counsel's representation fell below an objective standard of reasonableness or that the result of the trial would have been different if counsel had brought a motion for new trial on this ground. (See *Strickland, supra*, 466 U.S. at pp. 686-687, 694.)

Under article VI, section 13 of the California Constitution, the trial court may not grant a motion for new trial, unless after examining the record, it finds prejudicial error. (*People v. Ault* (2004) 33 Cal.4th 1250, 1271.) As defendants have failed to demonstrate that the trial court erred in denying bifurcation or that the gang evidence was prejudicial, it would not have been authorized to grant a new trial on the grounds asserted by defendants. We conclude that counsel did not render ineffective

assistance by refraining from making an unmeritorious motion. (See *People v. Price*, *supra*, 1 Cal.4th at p. 387.)

III. Johnson's motion for substitute counsel

Johnson contends that the trial court abused its discretion in denying his postverdict request to discharge retained counsel and appoint new counsel to bring a motion for new trial on the ground of ineffective assistance of counsel.

"The right to retained counsel of choice is -- subject to certain limitations -- guaranteed under the Sixth Amendment to the federal Constitution. [Citations.]" (*People v. Verdugo* (2010) 50 Cal.4th 263, 310 (*Verdugo*); see also *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 144, 151-152.) "In California, this right 'reflects not only a defendant's choice of a particular attorney, but also his decision to discharge an attorney whom he hired but no longer wishes to retain.' (*People v. Ortiz* (1990) 51 Cal.3d 975, 983; see Code Civ. Proc., § 284.) The right to discharge a retained attorney is, however, not absolute. [Citation.] The trial court has discretion to 'deny such a motion if discharge will result in "significant prejudice" to the defendant [citation], or if it is not timely, i.e., if it will result in "disruption of the orderly processes of justice" [citations].' [Citations.]" (*Verdugo*, *supra*, at p. 311, quoting *Ortiz* at p. 983.) "[A] trial court has 'wide latitude in balancing the right to counsel of choice against the needs of fairness' and 'against the demands of its calendar.'" (*Verdugo*, at p. 311, quoting *United States v. Gonzalez-Lopez*, at p. 152.)

"'The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power.' [Citations.]" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.) A trial court's "discretion must not be

disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]" (*People v. Jordan* (1986) 42 Cal.3d 308, 316.)

Johnson claims that the trial court failed to inquire whether he had retained new counsel or, if so, whether a continuance was necessary, and that the court erred in finding the request untimely. Johnson also contends that the motion should have been granted because there were meritorious grounds for a motion for new trial. Johnson acknowledges, however, that his request to discharge retained counsel was made on the day of sentencing, nearly one month after the verdicts were entered. And contrary to Johnson's view of the facts, when his retained counsel informed the court that he wanted to terminate his representation, the trial court asked Johnson whether he had retained new counsel. The court asked, "Mr. Johnson, do you have an attorney here today?" Johnson replied that he did not. The court clearly meant newly retained counsel, as the attorney Johnson wanted to discharge was present in court at the time.

The trial court also asked Johnson whether he wanted to represent himself. He said he did not, and asked the court to appoint a bar panel attorney to file a claim of ineffective assistance of counsel. The trial court denied the request, and proceeded to the trial on the alleged prior convictions. After the prosecution presented its evidence regarding prior convictions, Johnson's counsel informed the court that Johnson wanted to file a motion. The court denied that request because Johnson was not the attorney of record. Johnson renewed his request to discharge counsel, which the trial court denied as untimely, as it was made on the day of sentencing and the victim was there.

The trial court did not need to ask whether Johnson would need a continuance, as Johnson contends. Such a necessity was obvious under the circumstances, particularly when Johnson said, "But I got a *Strickland* issue." When new counsel would have to be retained or appointed and then study a lengthy trial record, become familiar with complex constitutional issues, and investigate the significance of the issues, significant delays are certain to result. (See *Verdugo*, *supra*, 50 Cal.4th at p. 311.) A trial court could reasonably find such circumstances to constitute a ""disruption of the orderly processes of justice,"" justifying denial of the motion to relieve counsel. [Citation.]" (*Ibid.*) We conclude that the trial court did not exercise its discretion in an arbitrary, capricious or patently absurd manner.

Moreover, Johnson fails to demonstrate that the ruling resulted in a manifest miscarriage of justice. A miscarriage of justice occurs when it appears that a result more favorable to the appealing party would have been reached in the absence of the alleged errors. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see Cal. Const., art. VI, § 13.) Johnson suggests that new counsel would have obtained a better result by bringing a motion for new trial on the ground of ineffective assistance of trial counsel. We discern no reasonable probability that such a motion would have been granted. Here, Johnson has devoted approximately 55 pages of argument in his appellate briefs to an unsuccessful effort to demonstrate that he received ineffective assistance of counsel, and we have determined with regard to that effort that counsel does not render ineffective assistance by refraining from bringing an unmeritorious motion for new trial.

Upon failing to demonstrate an abuse of discretion or a miscarriage of justice, he suggests that he is entitled to reversal without regard to prejudice because trial court's ruling amounted to a deprivation of his constitutional right to defend with counsel

of his choice and to a denial of the assistance of counsel altogether. However, defendant never asked to substitute retained counsel of his choice and he was not altogether denied assistance of counsel. The trial court simply and properly exercised its discretion to avoid the significant delays which were certain to result, and thus to preserve the orderly processes of justice. We conclude that if that determination had been error, Johnson would be required to show the reasonable probability of a more favorable outcome if the court had granted the motion. As Johnson has not done so, he has not demonstrated an abuse of discretion.

IV. One-year firearm enhancement

Defendants contend that the trial court was unauthorized to impose the one-year firearm enhancement as charged in count 1, because arming is an element of that offense. Section 12022, subdivision (a)(1), authorizes a one-year enhancement for the use of a firearm in the commission of a felony, "unless the arming is an element of that offense." Firearm use is an element of assault with a firearm. (§ 245, subd. (a)(2).) Respondent agrees that the enhancement should be stricken. (*People v. Sinclair* (2008) 166 Cal.App.4th 848, 855-856.) We will modify the judgments accordingly.

V. Presentence custody credit

The trial court awarded Johnson 649 actual days of presentence custody credit and 648 days of conduct credit. Johnson requests correction of the judgment to reflect four additional days of presentence custody credit, and asks that the abstract of judgment be corrected to reflect that the trial court awarded conduct credit according to section 4019, subdivision (f). Respondent agrees that Johnson was in custody from the time of his arrest on July 23, 2015, through May 3, 2017, the date of sentencing, which comes to a total of 651 days, entitling Johnson

to 651 actual days of custody credit and 650 days of conduct credit. We will modify the judgment accordingly and order the court to correct the abstract.

VI. *Pitchess* review

Tuggle brought a pretrial *Pitchess* motion[9] for the discovery of all material in the personnel records of Detective Dean and San Bernardino Police Officer Jonathan M. Plummer, regarding any issues of bias, dishonesty, and misconduct. The trial court granted the motion on the limited issues of dishonesty and threats of violence. After conducting an in camera review as to each of the officers, the trial court determined that there were no discoverable items in Detective Dean's records, but ordered the discovery of items in Officer Plummer's records. Tuggle requests that we review the sealed transcript of the *Pitchess* hearing regarding Detective Dean's records for possible error. We review the trial court's determination for an abuse of discretion. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1220-1221.)

The records produced in the trial court were not retained, but during the in camera hearing, the trial court examined and described each document, and stated reasons for its determination. We have the sealed transcript of that hearing before us, and find it sufficient to review the trial court's determination, without having to order the production of the same documents in this court. (See *People v. Mooc* (2001) 26 Cal.4th 1216, 1228-1229.) Upon review of the sealed record of the in camera proceedings, we conclude the trial court properly exercised its discretion in determining that the documents produced complied with the scope of the *Pitchess* motion, and that

---

[9] See *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*); *People v. Fuiava* (2012) 53 Cal.4th 622, 646; Penal Code sections 832.5 and 832.7, subdivision (a); Evidence Code sections 1043 through 1045.

none of the documents or information should be disclosed to the defense.

VII. Discretion to strike five-year enhancements

Both defendants ask that we remand to give the trial court the opportunity to exercise its discretion to strike the five-year enhancement imposed under former section 667, subdivision (a), due to their prior serious felony convictions.

Effective January 1, 2019, under the recently enacted amendments to sections 667, subdivision (a)(1), and 1385, subdivision (b), trial courts now have discretion to strike sentencing enhancements for prior serious felony convictions in the interest of justice. (Stats. 2018, ch. 1013, §§ 1 & 2.)

"When the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute's operative date. [Citation.]" (*People v. Brown* (2012) 54 Cal.4th 314, 323, fn. omitted, citing *In re Estrada* (1965) 63 Cal.2d 740, 744-745.) Under the *Estrada* rule, Senate Bill No. 1393 applies retroactively to all cases in which judgment is not yet final on appeal on January 1, 2019. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973.) Remand is required in cases such as this unless the sentencing record clearly indicates that the trial court "would not, in any event, have exercised its discretion to strike the [sentence enhancement]. [Citation.]" (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530, fn. 13 [amended Three-Strikes law]; see also *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1080-1081 [amended firearm enhancement statute], citing *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 [same].)

Here, the trial court found multiple factors in aggravation. As to both defendants, the court found that the crime involved

great violence and the threat of great bodily harm, and was committed with "a high degree of cruelty, viciousness, or callousness." The court further found that the manner in which the crime was carried out indicated "planning, sophistication, or professionalism." The court also listed factors relating to defendants such as prior prison terms and violent conduct which made them a serious danger to society. The court imposed the high term on each defendant and declined to strike prior convictions alleged under the Three Strikes law. However, the court struck defendants' one-year prior prison enhancements.

Although the trial court's findings, imposition of the high terms, and refusal to strike the prior strike convictions suggest that the court is unlikely to exercise its new discretion in defendants' favor, the court made no comment which clearly indicates that it would not, and respondent does not identify any such clear indication in the sentencing record. Under such circumstances, the better practice is to remand the matter for the limited purpose of allowing the trial court to consider whether to strike the enhancements. (See *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110-1111.)

DISPOSITION

The judgment against Tuggle is modified to strike the one-year firearm enhancement imposed under section 12022, subdivision (a)(1). The judgment against Johnson is also modified to strike the one-year firearm enhancement imposed under section 12022, subdivision (a)(1), and in addition, to award in place and instead of the presentence custody credit awarded by the trial court, 651 actual days of custody credit and 650 days of conduct credit, for a combined total of 1,301 days. The superior court is directed to prepare an amended abstract of judgment reflecting modifications, and to check the box indicating that custody credit was awarded under section 4019, subdivision (f).

As modified and in all other respects, both judgments are affirmed. Both matters are remanded for the trial court to exercise its discretion whether or not to strike the five-year enhancements imposed under section 667, subdivision (a)(1). If the court elects to exercise this discretion, the defendants shall be resentenced and the new sentences shall be reflected in the amended abstracts of judgment, which shall be forwarded to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST